"No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court."

Rule 285 is also relevant.

"285. Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceedings may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit."

In my opinion the application cannot succeed on the first ground.

The second ground is that the creditor is not in a position to proceed with the execution.

The date of the judgment on which the Bankruptcy Notice is founded is the 21st day of November, 1932. After the expiration of a year from that date the creditor is unable to obtain execution without the leave of the Court under the provisions of sections 246 and 247 of the Civil Procedure Code, 1918. No application for leave has been made.

It is argued that this amounts to a stay of execution, and that the Bankruptcy Notice ought not to have been issued.

It is clear from secton 4 (i) (*i*) and 4 (ii), Rule 90, read with the prescribed Forms Nos. 4 and 5 that a Bankruptcy Notice cannot issue where execution on the judgment has been stayed.

It is argued for the respondent that no order for a stay of execution has been made, and that section 246 of the Civil Procedure Code has no application.

This point was considered by the Court of Appeal in *Ex parte Woodall, In re Woodall*, 13 Q.B.D. 479, where it was held that the executor of a creditor who has obtained a final judgment is not entitled to issue a bankruptcy notice against the judgment debtor, unless he has obtained leave from the Court, under rule 23 of Order XLII of the Rules of the Supreme Court of 1883, to issue execution on the judgment. Under sub-section 1 (g) of section 4 of the Bankruptcy Act, 1883, the creditor who issues a bankruptcy notice must be in a position to issue execution on the judgment.

In *Ex parte Ide, In re Ide*, 17 Q.B.D. 755, the Court of Appeal decided that where a creditor has obtained judgment against a firm, but has not obtained the requisite leave under Order XLII., rule 10, to issue execution against a person alleged to be a member of the firm, he cannot serve such person with a notice under the Bankruptcy Act, 1883 (46 and 47 Vic. c. 52), section 4, sub-section 1 (g), which enables a creditor who has obtained final judgment against a debtor, "execution thereon not having been stayed," to issue a notice requiring the debtor to pay or secure the debt.

The following passage appears in the judgment of Bowen, L.J., at page 759:

"With regard to the construction of sub-section 1 (g) of section 4, I also agree that, in order to entitle a creditor to issue a bankruptcy notice, he must be in a position to issue execution on his judgment at the time when he issues the bankruptcy notice. It would be absurd to suppose that sub-section 1 (g) admitted of this construction that in a case in which execution could have gone at once, but for the order of the Court staying it, a bankruptcy notice could not be issued, and yet that, in a case in which execution could never have gone at all without the leave of the Court, a bankruptcy notice could be issued, and the debtor could be adjudged a bankrupt. We must look carefully at the words to see if there is not an implication to be found in them, and it seems to me that, from the collocation of the words 'final judgment' and 'execution thereon not having been stayed,' a necessary implication arises of this character, viz., that the creditor must not merely have obtained a final judgment but must be in a position to issue immediate execution upon it."

On these authorities I am of opinion that the applicant must succeed on the second ground.

The motion will be allowed with costs. There will be an order setting aside the Bankruptcy Notice.

Order accordingly.

[ORIGINAL CIVIL JURISDICTION]

THOMAS, C.J.

NOVEMBER 21, 1934.

KIRTHA SINGH alias KARTHAR SINGH **Plaintiff.**

v.

KABUL SINGH .....**Defendant.**

[SELANGOR CIVIL SUIT No. 193 of 1934]

The Civil Procedure Code, 1918, section 492—Arrest before Judgment—Action for damages—Malice—Termination of proceedings.

When an order of Court for arrest before judgment is obtained maliciously and without reasonable and probable cause, the Court, in dealing with a subsequent claim for damages on account of the arrest, is entitled to go into the circumstances under which the order was obtained and, where the circumstances or the merits are in favour of the plaintiff, to treat the order as though it had been discharged in his favour.

Decision in *Yap Piang* v. *Wong Lee Nam* (1931—1932) F.M.S.L.R. 367; 2 Mal. L.J. 102, followed.

A. J. Bostock-Hill and *S. M. Sharma* for the plaintiff.

G. A. Hereford and *K. K. Benjamin* for the defendant.

THOMAS, C.J.—In this suit Kirtha Singh alias Karthar Singh claims damages from the defendant Kabul Singh on account of his having been arrested at the instance of the defendant maliciously and without reasonable or probable cause.

The defendant by his defence denies that there was any malice, and that the arrest was without reasonable and probable cause. The defendant further pleads that in as much as the original order of arrest had not been suspended or discharged, no action lies.

The plaintiff was the administrator of his uncle's estate, and in connection with this administration a sum of $300 was borrowed from the defendant, and a promissory note for $309 was given. Some months later the defendant filed a suit against the plaintiff for the recovery of this sum, and obtained a warrant for his arrest. The plaintiff was in fact arrested on a Saturday, and remained in custody until the Monday following when he succeeded in paying into Court a sum of money adequate to cover the amount of the claim.

At the hearing of that suit the sum claimed $346 was not disputed. There was a dispute, however, in respect of a sum of $43 in respect of milk supplied, which it was sought to set off. The set off was not successful.

The evidence given at the hearing of the present suit is, in my opinion, conclusive that the defendant had no reasonable and probable cause in obtaining the arrest of the plaintiff, and that he was actuated by actual malice. I do not consider it to be necessary to go into the evidence in detail. I accept the evidence given for the plaintiff, I see no reason to reject the statement of Hazura Singh, who has explained the reason for his evidence given to the Magistrate. It may be urged that he has declared himself to be a liar, and that no attention should be paid to what he says now. If it stood alone, such might be the correct way to deal with it. But it does not. It is in accord with and explains the conduct of the defendant as spoken to by the witnesses for the plaintiff. I am, therefore, satisfied from the evidence that the action of the defendant in bringing about the arrest of the plaintiff was without reasonable and probable cause.

There remains the question raised by the defence viz. that the order of arrest had not been suspended or discharged in favour of the plaintiff. I have had recently to consider this question in the case of *Ing Chiat* v. *A. B. Nicholas*, (1933-1934) F.M.S.L.R. In my judgment in that case I said:—

> "From all these cases I conclude that the Court dealing with the subsequent suit is entitled to go into the circumstances under which the order was obtained and, where the circumstances or the merits are in favour of the plaintiff, to treat the order as though it had been discharged in his favour."

My attention has been drawn to the case of *Yap Piang* v. *Wong Lee Nam*, (1931-1932) F.M.S. L.R. 367 in which Thorne, J. said:—

> "In my view, in the events which happened in this case, the proceedings by way of a warrant for the arrest of the plaintiff came to an end as soon as he had provided security, and in the circumstances to which I have referred, the proceedings could not determine in favour of the plaintiff in the manner in which a prosecution in a criminal case is determined.
>
> I am of opinion that it is not incumbent upon the plaintiff in this suit to establish that the order for the issue of a warrant for his arrest had been set aside as a condition precedent to his present action . . . . ."

The case of *William* v. *Smith*, 143 E.R. 579 has been cited on behalf of the defendant. That case does not, in my opinion, challenge the view taken by Thorne, J. It would seem to find that an action for damages may not lie even when an attachment has been set aside. In that case Willis, J. said:—

> "The Master of the Rolls, by refusing to set aside the attachment adopted it; just as if it had been moved for and granted in open Court. The matter then went before the Lord Justices on appeal. They passed judgment regarding the sufficiency of the affidavit. What they decided was that the Master of the Rolls was mistaken in thinking that a contempt of Court had been committed; and on that ground they set aside the process. Restitution therefore, and not action was the plaintiff's proper remedy. This is simply one of that numerous class of cases—and I have no wish to limit their extent—where the acts of the Court, if erroneous cannot be made the foundation of an action for damages."

Byles, J. said:—

> "There is a manifest distinction between setting aside a process for irregularity and reversing a proceeding for error on appeal."

In the present case it is not a question of honestly acting upon an order of a Court obtained without irregularity. It is a question of obtaining an order of the Court maliciously and without reasonable and probable cause.

I have considered the question of damages, and am of opinion that a fair sum to award under all the circumstances in this case will be six hundred dollars.

There will, therefore, be judgment for the plaintiff for six hundred dollars and costs.

Judgment accordingly.

[APPELLATE CIVIL JURISDICTION]
THOMAS, C.J.
OCTOBER 5, 1934.

CHONG KWONG.....Appellant.

v.

PUBLIC PROSECUTOR.....Respondent.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 24 of 1934.]

The Opium and Chandu Enactment, 1931, section 15, sub-section (1) (e)—Sale of adulterated chandu dross to a superintendent—Mens rea.

The Opium and Chandu Enactment, 1931, section 15, sub-section (i) (e) makes it an offence for any person to offer for sale to a Superintendent adulterated Chandu dross. The appellant collected Chandu dross from his coolies and sold it to a Superintendent. On analysis this chandu dross was found to be adulterated, but the appellant was unaware of such adulteration.

Held, that the prohibition on the sale of adulterated chandu dross is absolute, and that knowledge of such adulteration by the person selling the dross is not necessary to constitute the offence.

Mark Morrison for the appellant. The presumption is that "mens rea" is a necessary element in every criminal offence—*Chisholm* v. *Doulton*, 22 Q.B.D. 726 and *Paul* v. *Hargreaves*, (1908) 2 K.B. 289.

When words like "knowingly" or "wilfully" are imported into a section the burden of proof is on the prosecution to prove the state of mind of the accused. Fact that such words are not imported into the section does not prevent the accused from proving absence of "mens rea."

There is a class of cases in which the legislature intends total prohibition, but to prevent presumption of "mens rea" there must be some indication in the Enactment itself or in the subject-matter thereof from which it can be clearly inferred that legislature intends total prohibition—e.g. Public Health Acts, Food Acts, etc.

Opium and Chandu Enactment is a trading venture of the Government and does not deal with public health. No indication in the Enactment that legislature intended total prohibition. If such was intended then under section 15, sub-section (i) (c) an innocent bailee of chandu dross exceeding 5 tahils in weight would be punishable with a fine of twenty times the value of the dross in excess of 5 tahils and Magistrate has no discretion.

H. C. Willan, Deputy Public Prosecutor, for the respondent. The legislature has intended that there should be absolute prohibition on the sale of adulterated chandu dross. Decided cases show that it is necessary to look at the object of an Enactment to see whether and how far knowledge is of the essence of the offence created. The provisions of section 15 of the Opium and Chandu Enactment amount to a total prohibition; otherwise the proviso to that section is redundant. Provisions similar to that proviso in respect of chandu and chandu dross are to be found in section 9, sub-section (b) and section 13, sub-section (iii).

Cur. Ad. Vult.

THOMAS. C.J.—The appellant was convicted by the learned Magistrate of Kuala Lumpur of selling adulterated chandu dross contrary to section 15(i)(e) of Enactment No. 5 of 1931, and sentenced to pay a fine of $5.

The facts briefly are that the appellant collected from various of his fellow workers who are opium smokers, their chandu dross. This together with his own he offered for sale to a superintendent. On the receipt of such a parcel from private vendors it is weighed and then passed to a customs cooly who wraps it up separately. This is all done in the presence of the vendor, and a temporary receipt is issued. A parcel was so received from the appellant on the 19th of June, 1934. All parcels are liable to analysis, and vendors are aware of this condition. Payments are made a fortnight after receipt of the parcels.

The appellant's parcel was in fact analysed, and was found to contain 2.30 tahils of second quality chandu dross of which 3.2 per cent. was amang. A distinction is drawn between first class and second class chandu dross. The following appears in the evidence:—

> "Maximum gain 52 cents supposing dross 1st class and amang worth nothing. If 2nd class dross 10 cents. Most dross 1st class."

The appellant explained that he was an opium smoker himself, and collected opium dross from his friends. Any payment in receipt thereof he would take for himself, and would not distribute any part of it amongst his friends, nor did he pay his friends for the opium dross received from them.

The learned Magistrate found that the adulteration was intentional, but was prepared to give the appellant the benefit of the doubt as to his knowledge of the adulteration, because he seemed to be a respectable man who would be unlikely to indulge in so comparatively unremunerative a fraud. In other words the learned Magistrate found that the appellant had no 'mens rea' or guilty mind when offering the chandu dross for sale.

It has been urged on this appeal that a 'mens rea' is an essential ingredient to an offence, and when such is lacking then an accused person cannot be convicted. That statement is rather too wide, since, in every case the language of the Enactment must be considered.

Thus it is frequently found that the words 'knowingly' or 'with intent' are introduced. In such cases it is for the prosecution to prove the